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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE,

ON PETITIONS TO RETHEAR FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-864, 71-863, 71-865, 71-866

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Opinion of the court of appeals is not yet officially reported. The opinions of the Federal Communications Commission are reported at 25 F.C.C. 2d 242 and 25 F.C.C. 2d 216. These opinions are set out in their entirety in Appendices A, B, and C, respectively, to the Petition for Certiorari filed in No. 71-864.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1971 and reissued on October 29, 1971. Petitions for rehearing and rehearing *en banc* were denied by the court of appeals on October 4, 1971. Petitioner invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech.

QUESTIONS PRESENTED

Whether (1) a decision of the U. S. Court of Appeals for the District of Columbia Circuit which set aside on First Amendment grounds a flat ban by broadcasters against selling *any* of their advertising time to persons wishing to speak about controversial issues of public importance and remanded to the Federal Communications Commission for further study and the formulation of reasonable guidelines is, in the total absence of evidence in the record to support any of petitioners' arguments, ripe for review by this Court and (2) whether any conflict among the Circuits exists which might warrant review by this Court.

Respondent, Business Executives' Move for Vietnam Peace, suggests that both questions should be answered in the negative and certiorari be denied.

STATEMENT

Washington, D. C. radio station WTOP holds out for sale to advertisers 18 of the 60 minutes in every hour it is on the air. Among the advertisements carried on November 13, 1970, for example, were a 75-second commercial for Bryce Mountain Land Development;[1] a 60-second advertisement for Manischevitz Wines;[2] and a 60-second commercial for Dr. Scholl's Foot Deodorant.[3] Yet, WTOP refused to sell respondent Business Executives' Move for Vietnam Peace, BEM, any time to broadcast a 60-second spot announcement presenting the views of prominent American industrial and military leaders opposing the Vietnam war:

> [I]t is the policy of [WTOP] radio and television stations not to sell spot announcement time to individuals or groups in order to set forth a point of view on any controversial subject of public importance. (Joint Appendix in the Court of Appeals at 7.)

BEM asserted before the Federal Communications Commission (hereafter "the Commission") that WTOP's flat ban on selling spot announcement time for controversial speech contravened the First Amendment. BEM made no claim with respect to the remaining 42 minutes per hour that WTOP reserves for presenting its own programming and views as it sees fit, subject only to loosely defined

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[1] Brief of Business Executives' Move for Vietnam Peace App. C at 2.

[2] *Id.*, p. 3.

[3] *Id.*, p. 8.

responsibilities to program in the "public interest",[4] "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance"[5] and other broadly phrased responsibilities.[6] BEM makes no effort to alter, abridge, amend or otherwise affect any of these programming time rights and obligations of licensees.[7] All that is before this Court then is the 18 minutes per hour which WTOP makes available for sale to advertisers to solicit in their own words and format customers for goods and services.

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[4] Communications Act of 1934, Sections 307, 309, as amended, 47 U.S.C. §§307, 309.

[5] Communications Act of 1934, Section 315(a), 48 Stat. 1088, as amended, 73 Stat. 557, 47 U.S.C. §315(a). This obligation and the body of law surrounding it is generally known as the "fairness doctrine."

[6] See Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C. 2d 650 (1971); Network Programming Inquiry, 25 Fed. Reg. 7291 (1960).

[7] BEM did assert an alternative theory before the Commission – *i.e.*, that its advertisements were entitled to be aired under the fairness doctrine. This claim was denied by the Commission. See Petition for Certiorari in No. 71-864 (hereinafter cited "Pet.") filed by the Solicitor General on behalf of the United States and the Federal Communications Commission, App. C, 91a-101a.

The Petition of the United States and the Commission (No. 71-864) seeks a writ of certiorari in both *DNC* and *BEM*. Post-Newsweek Stations, Capital Area, Inc., licensee of WTOP (hereinafter referred to as "Post" or "WTOP"), also seeks certiorari in BEM. (No. 71-865.) (Its Petition is hereinafter cited "Post Pet.") Columbia Broadcasting System, Inc. (hereinafter referred to as "CBS") (No. 71-863) and American Broadcasting Companies, Inc. (hereinafter referred to as "ABC") (No. 71-866) have each filed a Petition for Certiorari in *DNC*. (Hereinafter these Petitions are cited "CBS Pet." and "ABC Pet.",

(continued)

While BEM's complaint was pending, the Democratic National Committee (DNC) sought a declaratory ruling from the Commission that a "broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues."[8] DNC complained of no individual refusal to sell it time, rather it sought a general ruling.

The Commission ruled against both BEM and DNC on the same day in separate but cross-referenced opinions. (Pet. App. B and App. C.) Although there was no evidence of any harm to WTOP if it carried BEM's editorial advertisements – indeed WTOP never asserted it would suffer any injury by carrying them – the Commission sustained WTOP's flat ban on controversial short editorial advertisements. It stated that a licensee's obligations under the fairness doctrine[9] "to present *representative* community

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[7] (continued) respectively.) Although BEM is not a respondent in the last mentioned proceedings (Nos. 71-863 and 71-866), this Brief in Opposition is directed to all Petitions since the court below issued one inseparable decision in both *DNC* and *BEM*.

[8] Initially DNC seemed to be requesting a declaratory ruling covering both program length time segments and spot advertising time. But the Commission and the Court of Appeals treated it as dealing with spot advertisements only. See text following this note. Therefore as noted in the text, *supra*, all that is before the Court is the advertising time held out for sale to the public by broadcasters.

It should also be noted that the ruling requested by DNC did not deal with paid political ads on behalf of political candidates or in support of ballot propositions. These paid ads are widely accepted, but only during election campaigns. *Cf.* Communications Act of 1934, Section 315(a), as amended, 47 U.S.C. §315.

[9] Pet. 6.

views on controversial issues . . ."[10] was adequate under both the public interest standard and the First Amendment[11] to implement our "'profound national commitment that debate on public issues should be uninhibited, robust, and wide open.'"[12] The Commission noted that Section 3(h) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §153(h), declares that broadcasters are not "common carriers." It implied that to require any broadcaster to sell some of its spot advertisement time to someone at sometime might be inimical to this provision.[13]

In *DNC*, the Commission employed essentially the same grounds for refusing to rule that broadcasters must abandon flat bans on the sale of time to responsible entities seeking to comment on controversial issues.[14] Although DNC's request for a declaratory ruling of a general nature clearly invited a far reaching inquiry in which the Commission could gather relevant facts as to existing practices in the industry and the possible effects of such a ruling, the Commission acted without the benefit of such proceeding.

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[10] Pet., App. C, p. 101a, quoting *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 394 (1969).

[11] Pet. App. B, pp. 68a-69a, ¶28.

[12] Pet., App. B, p. 61a quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[13] See Pet. App. C, p. 100a-101a. The Commission relied on its reasoning in *Democratic National Committee*. See text following this note.

[14] The Commission did, however, hold that it would be arbitrary and contrary to the public interest for a licensee to refuse to sell time to the DNC or other significant political parties for the purposes of soliciting funds. Pet., App. B, pp. 72a-75a. No party below sought review of this determination and its rectitude is *not* before this Court.

BEM and DNC each filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. After briefing and argument in both *DNC* and *BEM*, but over seven weeks before issuance of the Court of Appeals' decision, the Commission initiated a general inquiry into the fairness doctrine.[15] Even though the Commission's *BEM* and *DNC* decisions stood at the time the general inquiry was launched, one aspect of this overall review was directed to a determination whether and under what conditions a limited right of individual access of the sort sought by *BEM* could and should be exercised[16] (this aspect is hereinafter referred to as "the Inquiry"). Because of its direct pertinence to the issues raised by petitioners, we quote the Inquiry in full:

> **ACCESS GENERALLY TO THE BROADCAST MEDIA FOR THE DISCUSSION OF PUBLIC ISSUES**
>
> 19. It has also been urged that, quite aside from the fairness obligation of broadcasters, there is a right of access – at least on a paid basis – for all those wishing to express a viewpoint on a controversial public issue. The Commission has rejected this blanket claim on the ground that there is neither Constitutional nor statutory right for any individual or group to present their views, and that as a matter of policy it would not serve the public interest to act as if there were. See, *e.g.*, the *Democratic National Committee* ruling, 25 FCC 2d 216 (1970), appeal

[15] *Study of Fairness Doctrine*, 30 F.C.C. 2d 26, 36 Fed. Reg. 11825 (1971).

[16] *Id.* at 33.

pending, *Democratic National Committee v. F.C.C.*, Case No. 24,537, C.A.D.C.; *Business Executives' Move for Vietnam Peace v. F.C.C.*, Case No. 24,942, C.A.D.C. The legal issues are thus before the Court, and the policy issues are sharply pointed up in the majority and minority opinions of the Commission. We request comment on the question *whether there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine.* More specifically, we ask that comment be addressed to the differing problems raised by paid and free time; the specific standards that should be followed for determining the basis on which time is to be provided, if such a course is recommended; the effect of any such new procedure on the licensee's general responsibility to the public; and the impact of such procedure on the licensee's duties under the fairness doctrine. *The essential purpose of this part of the inquiry is to ascertain, if possible, the general patterns of licensee practice as to access on a paid or sustaining basis (e.g., for discussion of controversial issues generally* or of ballot issues; for fund solicitation generally or for parties or committees organized around ballot issues), and *whether it would be appropriate for this Commission to lay down criteria or guidelines for these purposes. If so, what would they be?* Or, are the problems in this area so varied that decisions should be left to the judgment of thousands of licensees and, in cases of complaint, to the adjudicatory process? *In other words:*

should we reaffirm present Commission policy and practice? (Inquiry, *supra*, 30 F.C.C. 2d at 33 (emphasis added).)

On August 3, 1971, the court of appeals issued a single opinion reversing the Commission's orders in both *BEM* and *DNC*. Relying on *New York Times Co. v. Sullivan, supra*, Judge Wright, writing for himself and Judge Robinson,[17] stated that editorial advertisements are an important form of speech.[18] This Court has repeatedly stressed that such forms of expression must, under the First Amendment, be afforded access to speech forums.[19] An "unbroken line of authority"[20] has held that once the operators of such forums have opened them to speech, they may not discriminatorily bar controversial speech.[21]

In the face of these precedents, the court struck down the flat ban policy under challenge. It left undisturbed all

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[17] Judge McGowan dissented.

[18] Pet., App. A, pp. 28a-29a.

[19] *E.g., Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (public schools); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (privately owned shopping center); *Cox v. Louisiana*, 379 U.S. 536 (1965) (state capitol grounds); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town). The court below relied on *Red Lion, supra*, and *inter alia*, on these cases to establish that state action standards could be applied to broadcasters in the First Amendment area.

[20] See Pet., App. A, pp. 30a-31a.

[21] See cases cited at *ibid.* See *Cox v. Louisiana, supra; Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

other aspects of the regulatory scheme.[22] Indeed, because this case came to the court below from an administrative agency charged with primary regulatory responsibilities in this area, an agency which may draw upon its own expertise and that of its licensees, the court did not order that BEM's, DNC's or any other specific group's advertisements must be accepted by any broadcaster. Rather it confined itself

> to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air. (Pet., App. A, p. 3a.)

It directed only that

> [o]n remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. (Pet., App. A, p. 44a.)

The court took note of another reason for proceeding with caution: there are the severe limitations on broadcast time[23] which make it "idle to posit an unabridgeable First Amendment right to broadcast"[24] in a medium that "inherently is not available to all."[25] The court therefore made clear that any right of paid access to the broadcast

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[22] These include the fairness doctrine, a licensee's obligations to consult with community leaders, to provide programming of different types, etc.

[23] Pet., App. A, p. 37a.

[24] *Red Lion, supra* at 388.

[25] *National Broadcasting Co. v. United States,* 319 U.S. 190 226 (1943).

media must be a "reasonably regulated 'abridgeable'" [26] or "*limited*" right to speak. [27]

On Petitions for Rehearing and Suggestion for Rehearing en Banc, the full court, without dissent, denied the request for *en banc* rehearing and the petition for rehearing was denied by Judges Wright, Robinson and McGowan without dissent. The petitioners now seek to have this Court issue a writ of certiorari to review the judgment of the court of appeals.

At the time the petitions for certiorari were filed, the Solicitor General, [28] with the support of the broadcaster-petitioners, sought a stay. In the Application for Stay, the Solicitor General informed the Court that the Commission has suspended the "Access Generally To The Broadcast Media For The Discussion of Public Issues" phase of the *Study of Fairness Doctrine* proceeding – *i.e.*, the Inquiry (Application for Stay, p. 4.). Other than to note that certiorari is being sought, neither the Solicitor General nor the Commission has articulated any reason why the Inquiry, which was deemed necessary prior to the decision of the court of appeals, is less pressing now.

By order of this Court dated January 24, 1972, the stay was denied as follows: "The application for a stay presented to the Chief Justice, and by him referred to the Court, is denied."

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[26] Pet., App. A, p. 22a.

[27] *Id.*, p. 8a. (Emphasis in original.)

[28] As counsel for both the United States of America and the Commission.

REASONS FOR DENYING THE WRIT

I. PRELIMINARY ANALYSIS OF COURT OF APPEALS' DECISION

At the outset, it is useful to make clear what was and what was not held by the court below:

> The . . . issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme*[29] form of control which totally excludes controversial public debate from broadcast advertising time.
>
> We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do *not* hold, however, that the planned announcements of the petitioners – or, for that matter, *of any* other *particular applicant* for air time – *must necessarily be accepted* by broadcast licensees. Rather, *we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations* determining *which* and *how many* 'editorial advertisements' will be put on the air. Pet., App. A, p. 3a. (Emphasis added, except as noted.)

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[29] Emphasis in original, this footnote added.

The court specifically did not order any broadcaster to put anyone in particular, not even BEM, on the air. Rather, it clearly refused to treat broadcasters as common carriers relegated to selling their air time to all comers; it did not even require any broadcaster to accept any particular editorial advertisement, much less every one proffered,[30] and it made clear that, at this point, it leaves "up to the licensees and the Commission" the working out of a reasonable approach to selling some spot advertising time to persons wishing to speak on matters of public controversy.

The fairness doctrine, which was upheld by this Court in *Red Lion*, is not in any way affected by the court of appeals' decision; the Commission's and its licensees' discretion as to application and administration of that doctrine remain unaltered.

In contrast to petitioners' repeated arguments that the result reached by the court below is inconsistent, at odds with, or otherwise in conflict with this Court's *Red Lion* decision,[31] the court below went to great lengths to

[30] Thus, petitioners' repeated citations of *Red Lion, National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), *Green v. F.C.C.*, 447 F.2d 323 (D.C. Cir., 1971), and other cases for the proposition that no single person has an absolute right to express his views on radio or television address an issue not present in this case. Those decisions are not in any way inconsistent with the ruling below. Indeed, as noted *supra*, see p. 10, the court below was exceptionally sensitive to the time limitations and other problems faced by broadcasters as well as the regulatory obligations of the Commission and therefore articulated "a reasonably regulated, 'abridgeable' right to speak" (Pet., App. A, p. 22).

[31] *See, e.g.*, Pet. 11, 12; CBS Pet. 11, 13; Post Pet. 9 ("The lower court's decision stands *Red Lion* on its head."); ABC Pet. 5, 9.

emphasize that its result was consistent with the spirit of *Red Lion:*

> The *Red Lion* Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas [in the broadcast media]."[32] (Pet., App. A, at 21a.)

The court below stressed that this Court in *Red Lion,* while upholding the fairness doctrine as constitutionally permissible and consistent with First Amendment objectives, in no way suggested, let alone held, that the fairness doctrine exhausts all of the broadcaster's obligations or protects all of the public's First Amendment rights regarding the broadcast media:

> Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment law.[33] The *Red Lion* Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the *Red Lion* decision makes the goal of an informed public the *exclusive* First

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[32] Footnote 29 to opinion: "395 U.S. at 390. (Emphasis added.)"

[33] Footnote 28 to opinion: "*See Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General,* 381 U.S. 301, 307-308 (1965) (Mr. Justice Brennan, concurring); *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943). The right to receive, however, has not been considered the central First Amendment interest, and never the only First Amendment interest."

> Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context. (Pet., App. A, at 21a.)

All that the court held is that where a preferred form of speech[34] is at stake, the First Amendment requires that the Commission must "cease abdicating responsibility over the uses of advertising time" (App. A., p. 2a) to the *sole and unfettered* discretion of its licensees.

In short, the court has merely asked the Commission to develop guidelines to assure that the free speech rights and interests of the public are not unreasonably foreclosed. As for broadcasters, they simply have been instructed to exercise their professional competence and judgment to assure that *some* members of the public at *some* time have *some* opportunity to purchase access to *some* portion of the airwaves that that same public owns for presenting *some* of its views on *some* controversial issues of the day.

In sum, the court below merely suggested that broadcasters must make reasonable efforts in the selling of advertising time to behave like the able and benign "trustees" of a highly valuable public resource that they should be[35] and claim to be.[36]

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[34] *New York Times v. Sullivan, supra,* and *Valentine v. Chrestensen,* 316 U.S. 52, 54 (1942).

[35] *See* Pet. at 10-11. *See* also *Office of Communications of United Church of Christ v. F.C.C.,* 425 F.2d 543, 548 (D.C. Cir., (1969), emphasizing that broadcasters are "fiduciaries . . . of a great public resource and must meet the higher standards which are embraced in the public interest concept."

[36] See, *e.g.,* Pet., *op. cit.*; CBS Pet. 6, 15.

II. THE CASE AND ISSUES INVOLVED ARE NOT RIPE FOR REVIEW IN THIS COURT

Summary

The court below made clear that its decision is constitutionally grounded, specifically in the First Amendment.[37] All petitioners argue that this case presents questions of major constitutional import. While we do not deny that imbedded within the court of appeals' decision may lie major constitutional questions[38] that might be appropriate for review by this Court if presented in a context which would permit this Court an opportunity to thoroughly analyze their implications to the nation's broadcasting industry and the public, this is not such a case.

There is no factual record whatever in support of any of the assertions of disruption of orderly broadcasting or financial injury made by petitioners.[39]

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[37] Pet., App. A., p. 10a.

[38] A few possible problems which *might* arise in implementing a paid editorial access scheme (when one is formulated by the Commission), could include censorship of content or format of editorial advertisements by licensees or, on the other hand, impairment of a licensee's role as journalist (see fn. 44, *infra*, and accompanying text) as a result of the nature or number of editorial advertisements he must carry.

[39] The declaratory ruling sought by DNC gave the Commission a clear opportunity to develop a factual record on these and the other issues raised by petitioners, before issuing its decision. It eschewed this course of action but, as noted above, acknowledged the *need* for such an evidentiary approach to the problems raised in this case by initiating its Inquiry on June 12, 1971. See pp. 7-9, *supra*.

Nor is there any evidence before this Court concerning the possible burdens the Commission might suffer if forced to implement the mandate of the court below,[40] which, in effect, simply requires the Commission to continue the Inquiry it had itself begun and which leaves the Commission almost unfettered discretion to work out rules in which it could protect itself and the courts from a plethora of litigation.[41]

Nor is there any agency rule or regulation before this Court, let alone one based upon a thorough analysis of the factual and legal parameters. Cf. *Red Lion, supra.*

In short, the record presented to this Court is bare. Furthermore, both the Commission and the broadcasters have been afforded wide latitude to hammer out a fair and reasonable approach to editorial advertising. Under these circumstances, it is premature for the Court to grapple with the constitutional principles underlying the decision below. The case is not ripe for review.

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[40] It should be noted that mere inconvenience to or burden on a governmental body, unless it is demonstrably severe, both quantitatively and qualitatively, has never been regarded as a permissible ground for denying First Amendment protected rights. *See, e.g., Gregory v. City of Chicago,* 394 U.S. 111 (1969) and *Edwards v. South Carolina,* 372 U.S. 229 (1963). It is especially ironic to hear a regulatory agency like the Commission seek to be relieved of its statutory obligations on the ground that enforcing First Amendment rights may prove a burdensome task.

[41] It should be noted that the Commission concedes that its Inquiry might well reach a result "similar to that ordered by the Court of Appeals . . . ." (Pet. 15).

Discussion

The decision below does not alter broadcaster control over programming time.[42] Nevertheless, the broadcaster petitioners argue that if they are required to provide the public with limited paid access they will be deprived, in part because of the fairness doctrine,[43] of some control over issue origination and speaker format and language.[44] Moreover, petitioners express concern that under the Commission's *Cullman*[45] doctrine, the licensee might incur an

[42] As the court below stated: "It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with *time relinquished by broadcasters to others*. . . . In normal programming time, closely controlled and edited by broadcasters. . . . the broadcasters' own interests in free speech are very, very strong. [Footnote omitted.] The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But *in the allocation of advertising time, the broadcasters*[']. . . *speech is not at issue; rather all* that is at issue is *their decision as to which other parties will be given an opportunity to speak.*" Pet., App. A, pp. 19a-20a (emphasis added).

[43] The fairness doctrine imposes a two-fold obligation on licensees. First, they must air views on some controversial issues of their own choosing. Second, the views they present as to those issues must be balanced. See Pet. at 6. *Cf.* Brief for Respondents United States of America and Federal Communications Commission, below, at pp. 12-13: ". . . licensees have a general obligation to devote a reasonable portion of broadcast time to the discussion of controversial issues of public importance, and in doing so, to be fair, *i.e.*, to affirmatively present contrasting viewpoints held by responsible elements in the community."

[44] ABC Pet. 12; CBS Pet. 15; Post Pet. 10.

[45] *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). *Cullman* requires a broadcaster to present contrasting viewpoints at its own expense if paid sponsorship is unavailable. There is of course no direct economic threat from any access accorded groups as a result of the decision below. The decision deals only with the right to purchase spot announcement time; ABC's implications to the contrary (ABC Pet. at 9-10) are wrong. See opinion below (App. 3a) quoted, *supra*, at p. 12.

economic burden in meeting fairness doctrine obligations. Petitioners also warn that the national agenda of public issues which reach the airwaves may be unduly influenced by an invalid factor – *i.e.*, the wealth required to purchase editorial advertising time.[46] Finally, petitioners raise the related spectres of "administrative apocalypse"[47] and ominous governmental censorship through agency and court review of licensee decisions.[48]

At some point there may arise a real and documentable cause for concern that even a *limited* system of paid access might result in one or more of the dangers so strenuously argued by petitioners. But at this time the dangers are pure speculation[49] and sound principles of constitutional adjudication, which are designed to ensure that any judgment of this Court be both necessary and fully informed, inveigh against Supreme Court review of this case.[50]

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[46] Pet. 17, ABC Pet. 11-12, 15-16; CBS Pet. 15; WTOP Pet. 10.

[47] Pet., App. A, p. 40a.

[48] Pet. 11, 17; ABC Pet. 12-13; WTOP Pet. 10-11; CBS Pet. 16-17.

[49] *E.g.*, WTOP cites a total of *three* demands for time – one of which (*The Committee of One Million*, F.C.C. 71-1096 (October 22, 1971)) involved an attempt to purchase a program length segment, not a spot ad – as proving "it is only realistic to expect that demands for editorial advertising time will be numerous and widespread." (WTOP Pet. 16, n. 16.)

[50] See *United States v. International Union, etc.*, 352 U.S. 567 (1952) (Frankfurter); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter concurring); *United States v. Lovett*, 328 U.S. 303 (1946) (Frankfurter concurring); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis concurring).

This Court refuses to involve itself "where administrative intention is expressed but has not yet come to fruition . . . ."[51] This Court's policy clearly is to rule on the legality of a regulation before it is put into effect only where the challenged regulation specifically details prescribed or proscribed conduct and leaves the implementing agency no leeway in its enforcement.[52] Only in this way can the true agency position be ascertained and properly analyzed.

Here, not only is there no rule or regulation before the Court, but the Commission, both in failing to build a record before disposing of DNC's request for declaratory ruling and in initiating and then staying its Inquiry (see p. 11, *supra*) has taken every step possible to delay the development of the rules or regulations regarding paid editorial advertising which both it (Pet. 15.) and the court below believe are required.

What this Court is asked to review is a remand to the Commission to explore, in light of First Amendment considerations, the adoption of rules that Agency was already considering adopting. This Court is asked to resolve a vital First Amendment issue in a vacuum, where all that is before it is a remand intended to lead to rules which themselves can (and assuredly will) be the subject of judicial review. The Commission and the licensees ask this Court to relieve them of the burden of compliance with their responsibility under the Communications Act to exercise their expertise

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[51] *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426, 434 (1948).

[52] *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

to develop workable rules for securing "the more effective use of radio."[53] The Commission, while professing that its policy role has been usurped and that the court below impermissibly intruded into its zone of expertise, now asks this Court to declare it unnecessary for the Commission to exercise its policy responsibility to apply that expertise in its own Inquiry.[54]

In similar situations this Court has held that "sound discretion withholds the remedy where . . . at the moment adjudication is sought, [the challenged practice is] undergoing significant modification so that its ultimate form cannot be confidently predicted."[55] Where constitutional adjudication is involved, this discretion becomes a "reluctance, indeed refusal, to undertake the most important and most delicate of the Court's functions . . . until necessity compels it . . .".[56] This Court will undertake constitutional adjudication only in a "concrete factual setting that sharpens the deliberative process especially demanded for a Constitutional decision."[57] All of these principles make the instant matter plainly inappropriate for review by this Court on the record before it.

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[53] Communications Act of 1934, Section 301, Stat. 47 U.S.C. §301.

[54] See Pet., pp. 10, 12; see also Pet. in No. 71-865, pp. 18-19.

[55] *A. L. Melching Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961).

[56] *Rescue Army v. Municipal Court*, 331 U.S. 549, 570 (1947).

[57] *United States v. International Union, etc.*, 352 U.S. 567, 591 (1957). See also *Parker v. County of Los Angeles*, 338 U.S. 327 (1949), *Simmons v. West Haven Housing Authority*, 399 U.S. 510 (1970), rehearing denied, 400 U.S. 856 (1970).

On the slender record in this case there is no basis whatever on which to determine at what point, if any, any of the speculative dangers advanced by petitioners will arise to the level of reality.[58] In *Toilet Goods Association v. Gardner*, 387 U.S. 158, 163-4 (1967) this Court stated that its determination of the legality of a Food and Drug Administration regulation[59] required "not merely . . . an inquiry into statutory purpose, but concurrently . . . an understanding of what type of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets." It is plain that, on the record in the instant case, this Court could not possibly reach such an understanding of the regulatory problems which are hypothesized by petitioners. Where questions of "far reaching impact" are pressed for decision, "adequate and full bodied record is required."[60]

The Commission's now aborted *Study of Fairness Doctrine*, initiated prior to the court's decision, was specifically designed to determine if any of the dangers that have been asserted (but nowhere documented) as realities by petitioners might arise. The Notice of Inquiry

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[58] It seems plain, for example, that a rule which required broadcasters to carry only one editorial advertisement per 24 hour period would not trigger the consequences which petitioners fear. At the other extreme, a rule which prohibited any commercial advertisements even when all customers for editorial advertisements were satisfied would raise serious issues.

[59] That case involved a "final" agency regulation, unlike the present facts which involve nothing more than an *ad hoc* adjudicative ruling.

[60] *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 113 (1962)

explicitly contemplates that it may be workable to provide limited paid access for editorial advertisements:

> We request comment on the question whether there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine. More specifically, we ask that comment be addressed to the differing problems raised by paid and free time; the specific standards that should be followed for determining the basis on which time is to be provided, if such a course is recommended; the effect of any such new procedure on the licensee's general responsibility to the public; and the impact of such procedure on the licensee's duties under the fairness doctrine. *Study of Fairness Doctrine*, 30 F.C.C. 2d at 33.[61]

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[61] The court considered the arguments advanced here by petitioners and rejected each of them as too speculative. Pet., App. A, pp. 36a-42a. BEM's brief (at 37-52) and reply brief (at 24-31) in the court below deal extensively with each of these points and those discussions will not be repeated here. Moreover, we have already noted that some system of paid access is plainly feasible. But in view of the strenuousness with which the broadcasters have insisted that disaster will result from the decision below, it is useful to briefly note here some possible responses to some of the objections.

Contrary to the broadcasters' assertions (CBS Pet. at 8-9, 14-15; ABC Pet. at 6; *Cf.* Post Pet. at 10-11) the court did not limit the rules to be adopted to time, place and manner. ("*At the least*, there may be regulations determining the time, place, and manner of speech." Pet., App. A, p. 39a (emphasis added).) The court explicitly left open the possibility that it might be necessary to

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The Commission similarly concedes that it does not know whether (and, if so, under what criteria) broadcasters already are turning over substantial blocks of advertising time to the editorial spokesmen, be they wealthy or otherwise:

> The essential purpose of this part of the inquiry is to ascertain, if possible, the general patterns of licensee practice as to access on a paid or sustaining basis (*e.g.*, for discussion of controversial issues generally or of ballot issues; for fund solicitation generally or for parties or committees organized around ballot issues), and whether it would be appropriate for this Commission to lay down

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61 (cont'd) limit the amount of time sold to one group or to present a particular narrow viewpoint. Pet., App. A. p. 51a. (The court went so far as to say that respondent BEM's ads might be barred on these grounds in view of the extensive coverage given the Vietnam war. Pet., App. A, pp. 3a, 44a.) There is, in any event, no evidence in the record indicating that enough editorial advertising will come forward to in any way threaten a licensee's balanced programming with respect to any issue in view of the broad discretion accorded licensees in achieving an overall balance in the presentation of opposing views. *Fairness Primer: Applicability of the Fairness Doctrine to the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415 (1964). (It is not true that one spot ad may only be balanced with other spot ads. ABC Pet. at 10-11, 13, n. 7. See specifically In re *Wilderness Society, et al.*, 31 F.C.C.2d 729 (F.C.C. Memorandum Opinion and Order No. 71-971 (Sept. 17, 1971)).) The same "trustee" standards and approaches already used by broadcasters in choosing among competing ideas and speakers under the fairness doctrine could, for example, merely be extended to licensees making choices among competing applicants for paid access.

criteria or guidelines for these purposes. (*Ibid.*)[62]

It is clear that some broadcasters already accept some editorial advertisements.[63] (See Post Pet., p. 14.) There is not one scintilla of evidence in the record that any of those broadcasters suffer any of the horrors postulated by petitioners. Surely the guidelines employed and the

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62 Again the court directly dealt with the argument that the wealthy would dominate the national agenda. Pet., App. A, pp. 40a-41a. The guidelines developed in the fairness area are of course relevant. See note 1, p. 17 *supra*. Moreover, the right of paid access recognized by the lower court is a complement to, not a substitute for, the fairness doctrine. Since the application of the latter doctrine is left intact by the lower court's decision, it would operate to assure that no particular group, point of view or issue could preempt the airways, no matter the number of dollars at its command.

In any event, by the very nature of commercial media, the wealthy have always had greater access to public forums than the under-financed. It would be anomalous to preclude the latter groups because of the fear that their limited right of access will further entrench the access of the wealthy. Even a benign and paternalistic broadcaster controlling all access (*cf.* ABC Pet. No. 71-866, 5, 8; CBS Pet. No. 71-863 at 15) may inadvertently overlook the views of such groups. When they do manage to raise the money to present an editorial, flat bans will clearly preclude their self-expression. Moreover, even less than wealthy persons might be able to afford to purchase one spot announcement and, in it, request funds to finance additional ones. *Cf.* F.C.C. Opinion in *DNC*, Pet., App. B., at 72a-73a.

63 It is also clear that many commercial advertisements are in fact taking positions on controversial issues of public importance. See *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir., 1968), *cert.*

(cont'd)

experience of such broadcasters is highly relevant to a determination of whether a regime of paid access for editorial messages is workable. And, in the Inquiry, the Commission expressed an open mind about whether such a system would result in administrative apocalypse. It asked:

> Whether it would be appropriate for this Commission to lay down criteria or guidelines . . . . If so, what would they be? Or, are the problems in this area so varied that decisions should be left to the judgment of thousands of licensees and, in cases of complaint, to the adjudicatory process? (Inquiry, pp. 7-9, *supra.*)[64]

The Commission concluded its Notice of Inquiry with a question:

> [S]hould we reaffirm present Commission policy and practice? (*Ibid.*)[65]

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[63] (cont'd) *denied sub nom Tobacco Institute v. F.C.C., 396* U.S. 842 (1969); *Friends of the Earth v. F.C.C.,* ___F.2d ___(D.C. Cir. No. 24,556, August 16, 1971); *Letter to National Broadcasting Co.,* 30 F.C.C. 2d 643 (F.C.C. 71-704, June 30, 1971).

[64] Neither administrative anarchy nor censorship is any more likely under a system of limited paid access than already exists under the fairness doctrine. Every refusal to broadcast a contrasting viewpoint is also potentially the subject of a complaint to the Commission and of court review.

[65] The Commission's stated intention to investigate the extent to which a system of limited paid access is feasible must of course silence any protest that such a system violates the statutory scheme. (cont'd)

In the face of the "woefully lacking"[66] record in this case, only a showing of extreme "hardship" might justify a decision by this Court.[67] This has been the consistent position of this Court in cases involving even administrative regulations.[68] Where First Amendment rights are involved, the showing of hardship imposed on the person silencing speech must be concomitantly greater.[69]

This Court's refusal to review at this time would inflict no real harm on any of the petitioners. The broadcasters have not been ordered to sell spot announcement airtime for any specific editorial advertisements. The

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65 (cont'd) It is repeatedly contended (Pet. at 3; CBS Pet. at 10-11; Post Pet. at 3; ABC Pet. at 9) that the limited system of paid access sought by respondent would convert licensees into common carriers in violation of Section 3(h) of the Communications Act, 47 U.S.C. §153(h). Section 315 is cited in support of this proposition. While the court disposed of these contentions on the merits, (Pet. App. A, pp. 37a-38a) the Commission could not have reached the same result in its Inquiry if this violated the statute. The Commission was clearly cognizant of Section 3(h). It opened the Inquiry with explicit mention of its duty to abide by this provision. 30 F.C.C. 2d 26-27. Yet consistent with that duty, it proposed a study of a limited right of paid access.

66 *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 113 (1962).

67 *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

68 *Toilet Goods Association, supra*, 387 U.S. at 162-166.

69 See *Near v. Minnesota*, 283 U.S. 697 (1931).

case has simply been remanded to the Commission to determine under what circumstances some members of the public may be entitled to air their ads.[70] The Commission for its part, had already begun a proceeding to gather data it needs to determine the conditions under which a limited system of paid access could be implemented. No untoward burden is imposed on the Commission by requiring it to resume that proceeding which it has unexplainedly suspended.

In the delicate area of speech, this Court has long recognized that the Constitution requires that persons be afforded the broadest *possible* opportunity for self expression.[71] Before restricting or expanding the "breathing space"[72] which speech via the broadcast media enjoys, this Court should have some notion of what are likely to be the effects of a system of limited paid access. In *Red Lion*, the Court was presented similar protestations of doom by the broadcasting industry regarding the application of the fairness doctrine.[73] If the personal attack and political editorialization doctrines of the Commission were allowed to stand, it was argued, the result

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[70] It is true that even before the Commission promulgates final guidelines, broadcasters will have to abandon flat bans to editorial advertisements. If this creates serious problems, the courts are as available to broadcasters as to private parties.

[71] See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940), holding that governmental restrictions on speech must be narrowly drawn "so . . . as not, in attaining a permissible end, unduly to infringe upon the protected [First Amendment] freedom." See also *Cox v. Louisiana, supra*, and *Edwards v. South Carolina*, 372 U.S. 229 (1963).

[72] *NAACP v. Button*, 371 U.S. 415, 433 (1963).

[73] See *e.g.*, briefs of CBS and National Broadcasting Co. in *Red Lion, supra.*

would be to deter speech because of the obligation to present opposing views.[74] The Court responded that:

> that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues . . . . And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. (*Red Lion*, 395 U.S. at 393.)[75]

Here, too, there will be time enough to review the workability of a regime of limited paid access in the light of experience. A premature review could indeed result in a "constitutional straight-jacket" which might either over-protect or under-protect speech.

The case is plainly not ripe for review.

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[74] It is ironic, to say the least, to now find the broadcasters citing the fairness doctrine as the panacea for public rights with which they can comfortably live.

[75] To the extent timorousness has resulted from the chilling effect of the fairness doctrine, (see *Red Lion, supra* at 393-94) some system of limited access suggested by the court below provides one means of assuring some amelioration. See, *e.g.*, Pet., App. A, pp. 24a-25a.

III. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

Citing two superannuated decisions in other circuits – *McIntire v. William Penn Broadcasting Co.*, 151 F.2d 597 (3rd Cir., 1945) *cert. denied*, 327 U.S. 779 (1946) and *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir., 1950) – the three broadcaster petitioners allege that the decision below creates a direct conflict among the circuits.[76]

The Solicitor General, on the other hand, eschews making any such argument. Rather, noting that the Commission's report, *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, was not adopted until 1949 and its *Fairness Primer, supra*, was not published until 1964, the Solicitor General merely cites the *McIntire* and *Massachusetts Universalist* decisions as reaffirming licensee discretion "to determine what *programming* is in the public interest." (Pet. 14, fn. 6. Emphasis added.)

Examination of the *McIntire* and *Massachusetts Universalist* cases indicates that they are in no way in conflict with the decision below. First, both cases involved the sale of *programming* time, not spot announcement time, whereas the court below made clear that *its decision was limited to the latter form of time, i.e.*, that time which commercial broadcasters hold out for sale to members of the public.

Second, both *McIntire* and *Massachusetts Universalist* involved actions brought in U.S. District Courts to require broadcasters to sell airtime. The dispositive rationale

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[76] ABC Pet. 14-16; CBS Pet. 17-19; Post Pet. 11-14.

of both cases was that the district courts lack jurisdiction to entertain such actions since the Communications Act vested in the Commission "the power to pass upon all such allegations of unfair treatment as the plaintiffs made here respecting the defendant." (*McIntire, supra,* 151 F.2nd at 597; *Massachusetts Universalist, supra,* 183 F.2nd at 500, citing *McIntire.*)[77]

Third, neither *McIntire* nor *Massachusetts Universalist* involved a *flat* ban on political speech, but rather involved the cancellation of a specific speaker's contract to purchase programming time. Thus, those cases involved none of the questions of discrimination against political speech in favor of commercial speech which, in part, persuaded the court below to reach its result. The cases are fully consistent with the narrow ruling of the court below which simply invalidated "the flat ban [against selling editorial advertising time] alone leaving it up to the licensees and the Commission to develope and administer reasonable procedures and regulations determining which and how many editorial advertisements would be put on the air."[78]

Finally, to the extent that *McIntire* and/or *Massachusetts Universalist* suggested, by way of dictum,[79] that the

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[77] See also *Retail Store Employees Union, Local 880 v. F.C.C.* 436 F.2d 248, 256 fn. 49 (D.C. Cir., 1970): "since *McIntire* merely held that regulation of program content was within the province of the Commission rather than the district courts, the citation can hardly be regarded as illuminating."

[78] Pet., App. A, p. 3a.

[79] Any statement regarding the application of the First Amendment was dictum in those cases because, as noted above, they were grounded upon determination that district courts lacked jurisdiction to entertain the complaints.

First Amendment does not govern the operations of broadcasters in allocating their airtime, that notion has been firmly put to rest by this Court in *Red Linon, supra,* at 386: "broadcasting is clearly a medium affected by a First Amendment interest . . . ."

Thus, as recognized by the Solicitor General, the two ancient cases cited by the broadcaster petitioners are not in conflict with the decision below. At best they take a different point of view on other issues (sale of programming, not spot announcement, time and the jurisdiction of the district courts) which arose in a context prior to the advent of the Fairness Doctrine and this Court's affirmation in *Red Lion* that the First Amedment clearly must govern the way in which a broadcaster deals with controversial issues of public importance.

CONCLUSION

For the reasons above stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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